Can European consensus encourage acceptance of the European Convention on Human Rights in the United Kingdom?

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1. Introduction

The European Court of Human Rights (ECtHR) utilises "European consensus" in its decision making for a variety of reasons. Most importantly, it is assumed that this methodology, generally defined as a presumption which "favours the solution to a human rights issue which is adopted by the majority of the Contracting Parties"[1], can enhance the legitimacy of the Court's judgments, particularly where it has engaged in evolutive interpretation, and thereby persuade the governments of Contracting States to implement the judgments where it has been employed.[2] With criticism of the Court and the European Convention on

[1] K. Dzehtsiarou *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: CUP, 2015), p. 39. The ECtHR also uses standards set out in applicable international instruments and reports to identify common European standards. See the Court's definition set out in its judgment in *Mosley v UK*, Application no. 48009/08, 10 May 2011, [110].

[2] Dzehtsiarou, ibid, 184. From his interviews with ECtHR judges, Dzehtsiarou also concludes that European consensus is used to avoid arbitrary decision making, determine the scope of the margin of appreciation and to assist the Court in dealing with novel issues of interpretation. See generally chapter 7. See also C. Draghici, 'The Strasbourg Court between European and local consensus: anti-democratic or guardian of democratic process?' [2017] *Public Law* 11, 11; and K. Henrard, 'How the European Court of Human Rights' concern regarding European consensus tempers the effective protection of freedom of religion' (2015) 4 *Oxford Journal of Law and Religion* 398, 414.

Human Rights (ECHR) system escalating in a number of States,[3] it is likely that the Court will turn more and more to this method of decision making in an effort to legitimise its judgments. Furthermore, as States continue to appreciate the value of consensus based arguments, and increasingly resort to various claims of consensus in their submissions before the Court, it is also possible that the method will be formalised and, as with the principles of subsidiarity and the margin of appreciation, eventually make its way into a new Protocol to the Convention.[4]

Whilst the use of European consensus by the Court is receiving some attention in the relevant scholarship,[5] there has been very little assessment of the validity of the above assumption that this method enhances the legitimacy of judgments. There has also been little acknowledgment that, whilst the Court's efforts to increase the legitimacy of its judgments in this manner might be favourable to the governments of Contracting States, there is a risk that too much reliance upon consensus will negatively impact upon the

[3] See, for example S. Lambrecht, 'Reforms to Lessen the Influence of the European Court of Human Rights: A Successful Strategy?' (2015) 21 *European Public Law* 257; L. Malksoo, 'Russia's Constitutional Court defies the European Court of Human Rights' (2016) 12 *European Constitutional Law Review* 377; B. M. Oomen, 'A serious case of Strasbourg-bashing? An evaluation of the debates on the legitimacy of the European Court of Human Rights in the Netherlands' (2016) 20 *The International Journal of Human Rights* 407; and S. Adamo, 'Protecting International Civil Rights in a National Context: Danish Law and Its Discontents' (2016) 85 *Nordic Journal of International Law* 119.

[4] See Protocol No. 15 to the ECHR which has not yet come into force.

[5] See, for example, Dzehtsiarou, *European Consensus*; Draghici, 'The Strasbourg Court'; Henrard, 'How the European Court'; and H. Fenwick, 'Same sex unions at the Strasbourg Court in a divided Europe: driving forward reform or protecting the Court's authority via consensus analysis' (2016) *European Human Rights Law Review* 248.

legitimacy of the Court from the perspective of applicants, NGOs and other civil society actors.[6]

In this chapter the actual and potential impact of the use of European consensus by the Court in its decision making will be considered in relation to the United Kingdom where scepticism surrounding the ECHR system prompted current Prime Minister Theresa May, prior to the Brexit Referendum, to call for the UK to withdraw from the European Convention on Human Rights.[7] Whilst the UK is not alone in its animosity towards the Court, it makes for an interesting case study to test whether or not consensus methodology can actually increase the legitimacy of the ECtHR for all of those with a stake in the Convention system. The chapter starts with an overview of judgments of the European Court of Human Rights concerning the UK where it has employed consensus based reasoning. It is then considered what part consensus methodology has played in debates concerning the legitimacy of the Convention system in the UK and whether or not it has actually endangered legitimacy for non-governmental stakeholders.

2. The UK's experience of European consensus

Before determining what impact European consensus decision making by the ECtHR has had on acceptance and legitimacy in the UK, it is important to set out an overview of the relevant judgments. Over the last ten years, use of the consensus method of decision making by the Court in its judgments concerning the UK has increased significantly, marked by a steady increase in judgments where European consensus has indicated to the Court

[6] This is raised as a concern by Fenwick, ibid.

[7] See http://www.conservativehome.com/parliament/2016/04/theresa-mays-speech-on-brexit-full-text.html last accessed 9 May 2017.

that it should not find a violation on the part of the UK. For example, in 2014 in all four judgments where consensus was used to help the Court reach a decision in an application concerning the UK, this was to support the conclusion of the Court that there was no violation.[8] The converse is also true; in recent years there has been a marked decrease in the use of consensus to support a finding of violation on the part of the UK.

In applications brought against the UK, the consensus method of decision making has been utilised to determine the width and application of the margin of appreciation and to assist the Court in dealing with novel issues of interpretation concerning the scope of Convention rights. An example where the width of the margin of appreciation was affected by consensus based reasoning was *Animal Defenders International v UK*.[9] Here the applicant complained to the ECtHR about the prohibition on paid political broadcast (television and radio) advertising imposed by section 321(2) of the Communications Act 2003. Its claim under Article 10 of the ECHR had been heard by both the UK High Court and the House of Lords and both had concluded that the interference was compatible with Article 10 of the ECHR and therefore refused a declaration of incompatibility under the Human Rights Act 1998 (HRA).

[8] *Jones v UK*, Application nos. 34356/06 and 40528/06, 14 January 2014; *National Union of Rail, Maritime and Transport Workers v UK*, Application no. 31045/10, 8 April 2014; *Hassan v UK*, Application no. 29750/09, 16 September 2014; *Gough v UK*, Application no. 49327/11, 28 October 2014.

[9] Application no.48876/08, 22 April 2013.

Prior to the judgment of the ECtHR, many commentators assumed, based on the Courts' previous jurisprudence, that it would find a violation of Article 10.[10] It was expected that, given this was political communication[11] and that the UK had imposed a blanket ban, the margin of appreciation would be narrow. However, in its judgment, when determining the width of the margin of appreciation, the Court chose to look at the consensus amongst various States on the regulation of paid political advertising rather than the consensus on blanket bans. Finding that there was no European consensus between Contracting States on how to regulate paid political advertising in broadcasting, the Court used this lack of consensus to broaden the margin of appreciation.[12] Taking this into account, the Grand Chamber of the ECtHR narrowly found no violation of Article 10 of the ECHR by nine votes to eight.

Consensus has also been used by the Court in applications against the UK to determine the scope of Convention rights, in particular whether or not it should take a new direction in the development of a Convention right. For example, in *Da Silva v UK*[13] the applicants argued it was incompatible with Article 2 of the ECHR for no-one to be criminally prosecuted in relation to the death of a man who had been shot by police. The ECtHR observed that there was no uniform approach among Contracting States with regard to the review of

[10] See further: S. Sackman, 'Debating 'democracy' and the ban on political advertising' [2009] 72 *Modern Law Review* 475; T, Lewis and P. Cumper, 'Balancing freedom of political expression against equality of opportunity: the courts and the UK's broadcasting ban on political advertising' [2009] *Public Law* 89.

[11] The applicants wished to broadcast a 20 second animal rights advertisement.

[12] [123].

[13] *Da Silva v UK*, Application no. 5878/08, 30 March 2016.

prosecutorial decisions or, it if was available, of the scope of that review[14] and it was unwilling to expand the scope of Article 2 because there was insufficient consensus among Contracting States on the question. In the four dissenting opinions, comparative law was actually used to support the conclusion that the test applied under English law was more stringent than in other States. Another example is the judgment in *Jones v UK*[15] where the Court employed consensus based reasoning to conclude that whilst there was movement towards establishment of a torture exception to state immunity, there was no consensus yet so the Court was not willing to interpret Article 6 of the ECHR in this way.[16] And in *Vinter v UK*[17] comparative and international law materials were used to support the Court's conclusion that in order to be compatible with Article 3 of the ECHR, where a prisoner was sentenced to a whole life tariff (a whole life sentence), there must be a review at the 25 year point.[18]

In all of these judgments, with the exception of *Vinter*, consensus was used by the Court to support its conclusion that the UK had not breached Convention rights. In recent years, examples where consensus has been used by the ECtHR to support a conclusion that the UK was in violation of the ECHR are fewer in number. Two high profile judgments concerning highly politicised issues are important to note. First, in *S and Marper v UK*[19] the applicants complained that their fingerprints and DNA samples were retained by police even though

[14] [279].

[15] *Jones v UK*, Application nos. 34356/06 and 40528/06, 14 January 2014.

[16] [209].

[17] Application no. 66069/09, 9 July 2013.

[18] [120].

[19] Application no.30562/04 and 30566/04, 4 December 2008.

they were not convicted of any crime. The Court considered the law and practice in Council of Europe Member States and stated as follows:

> The Court cannot, however, disregard the fact that, notwithstanding the advantages provided by comprehensive examination of the DNA database, other Contracting States have chosen to set limits on the retention and use of such data with a view to achieving a proper balance with the competing interests of preserving respect for private life. […] In the Court's view, the strong consensus existing among the Contracting States in this respect is of considerable importance and narrows the margin of appreciation left to the respondent State in the assessment of the permissible limits of the interference with private life in this sphere.[20]

The Court concluded unanimously that the "blanket and indiscriminate nature of the powers of retention" were incompatible with Article 8 of the ECHR as the UK had overstepped any "acceptable margin of appreciation in this regard".[21] Rather than considering differences across state practice regarding the retention of this kind of information, the Court looked for whether or not there was consensus on blanket retention regardless of conviction. This is in direct contrast to its approach in *Animal Defenders International* where it did not consider the consensus on blanket broadcast bans but consensus on the regulation of political advertising generally.

The second example where the Court used consensus to support a finding of violation is *Hirst v UK (No.2)*.[22] Here the Grand Chamber determined that the UK's blanket ban on

[20] [112].

[21] [126].

[22] Application no.74025/01, 6 October 2005.

prisoners voting in national elections was incompatible with Article 3 of Protocol 1 to the ECHR with consensus playing a part in the Court's reasoning. Whilst the UK government argued that the margin of appreciation should be wide, as there was no clear consensus among Contracting States, the Court disagreed stating, somewhat cryptically, the following:

> […] the United Kingdom is not alone among Convention countries in depriving all convicted prisoners of the right to vote. It may also be said that the law in the United Kingdom is less-far reaching than in certain other States. […] However, the fact remains that it is a minority of Contracting States in which a blanket restriction on the right of convicted prisoners to vote is imposed or in which there is no provision allowing prisoners to vote. Even according to the Government's own figures, the number does not exceed thirteen. Moreover, and even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue […] the margin of appreciation is wide, it is not all-embracing.[23]

The dissenting judges disagreed finding that there was little consensus in Europe about whether prisoners should have the vote and that there were blanket and limited restrictions in the majority of member States. Therefore "the legislation in the United Kingdom cannot be claimed to be in disharmony with a common European standard."[24] Again the Court's

[23] [81]-[82].

[24] Joint dissenting opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens, [7]. Other examples of consensus being used by the Court to support a finding of violation on the part of the UK include: *Othman v UK* Application no. 8139/09, 17 January 2012 where consensus was used to reach a conclusion on the admission of torture evidence and flagrant denial in the context of Article 6; *Hanif and Khan v UK* Application nos. 52999/08 and 61779/08, 20 December 2011 where consensus was used to support conclusion that it was in

approach here, namely the narrowing of the margin of appreciation on the basis of the fact that there was no consensus on a blanket ban, was in direct contrast to its approach in *Animal Defenders International* where it did not look for consensus on the blanket prohibition.

3. Enhancing legitimacy for the UK government

3.1 A crisis of legitimacy in the UK

Given that in recent years consensus based reasoning on the part of the ECtHR has been used to support findings of non-violation in cases against the UK, as well as to draw very controversial (for some) conclusions that the UK has breached the Convention, as was the case with the *Hirst* judgment, it is important to consider how this has impacted upon the legitimacy debate in the UK. It is no exaggeration to state that the ECtHR, and the ECHR system as a whole, is currently experiencing a crisis of legitimacy in the UK which started in earnest in 2006[25] and peaked in October 2014 with the publication by the Conservative Party, then in opposition, now the party of government, of its plans to reform human rights law in the policy paper *Protecting Human Rights in the UK.*[26]

violation of Article 6 in the circumstances of the applicants to allow police officers to serve on juries; and *Al-Saadoon and Mufdhi v UK* Application no. 61498/08, 2 March 2010 where consensus was used in reaching the conclusion that Article 2 had been amended so as to prohibit the death penalty in all circumstances.

[25] Former Prime Minister David Cameron in a speech at the Centre for Policy Studies, 26 June 2006, called for the repeal of the HRA and its replacement with a UK Bill of Rights. See W. Woodward, 'Cameron promises UK bill of rights to replace Human Rights Act' *The Guardian*, 26 June 2006, page 10.

[26] Conservative Party *Protecting Human Rights in the UK* (London: Conservative Party, 2014).

In the proposals it is stated that the recent practice of the ECtHR "and the domestic legislation passed by Labour" has damaged the credibility of human rights at home.[27] Use of consensus based reasoning by the Court is not mentioned but the treatment of the ECHR as a "living instrument" or the practice of "evolutive interpretation" by the Court, is singled out for strong criticism as follows:

> Even allowing for necessary changes over the decades, the ECtHR has used its 'living instrument doctrine' to expand Convention rights into new areas, and certainly beyond what the framers of the Convention had in mind when they signed up to it.[28]

Judgments of the Court utilised to illustrate the points made included: prisoner voting; artificial insemination for some prisoners;[29] and (generally) the prevention of the deportation of foreign nationals who have committed crimes. The whole life tariff judgment of the Court in *Vinter v UK*[30] was also mentioned although the interpretation of the judgment was incorrect. The ECtHR did not determine that "murderers cannot be sentenced to prison for life" or ban "whole life sentences even for the gravest crimes".[31] As noted above, it simply determined that where a prisoner is sentenced to spend the rest of his or her life in prison, there must be a review at the 25 year point.

The plans for reform of the ECHR system included in the proposals were to make the judgments of the ECtHR "no longer binding over the UK Supreme Court" and for it to be "no

[27] P. 3.

[28] P.3.

[29] *Dickson v UK*, Application no. 44362/04, 4 December 2007.

[30] Application no. 66069/09, 9 July 2013.

[31] P.3.

longer able to order a change in UK law" as it was to become an "advisory body only".[32] It was promised that, should the Council of Europe not agree to this approach, the UK would withdraw from the ECHR. As noted above, further support for withdrawal from the ECHR was later given by current Prime Minister Theresa May who, when Home Secretary in April 2016, gave a speech supporting the UK staying in the EU but leaving the ECHR illustrating her case with the deportations of Abu Hamza and Abu Qatada[33], delayed by applications to the ECtHR, and the fact that the ECtHR "tried to tell Parliament that – however we voted – we could not deprive prisoners of the vote". She summed up her opinion of the Court as follows:

> The ECtHR can bind the hands of Parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals – and does nothing to change the attitudes of governments like Russia's when it comes to human rights.[34]

With the change in government leadership following the decision to implement the Brexit Referendum result and leave the European Union, the openly hard-line stance on the ECtHR has softened a little. It was promised in the White Paper accompanying the Bill which will

[32] As the UK is a dualist system, these statements in the proposals were also misleading.

[33] Ahmad v United Kingdom, Application no. 24027/07, 10 April 2012; *Othman (Abu Qatada) v United Kingdom*, Application no. 8139/09, 17 January 2012.

[34] In a speech in June 2016 prior to becoming Prime Minister, she promised that she would not lead the UK out of the ECHR as she appreciated that she did not have the numbers in Parliament to achieve this. See further https://rightsinfo.org/breaking-theresa-may-will-not-try-leave-european-convention-human-rights/ last accessed 10 May 2017.

incorporate EU law into UK law that there were "no plans to withdraw from the ECHR."[35] At the time of writing the political parties putting forward candidates to stand at the 2017 general election had not published their manifestos. It is likely that the Conservative Party will promise to replace the Human Rights Act 1998 (HRA) with a UK Bill of Rights, as it has also done in its 2010 and 2015 manifestos, but will not also promise to take the UK out of the ECHR. With negotiations with EU institutions regarding the terms of Brexit ongoing for the next couple of years, the added political difficulties of also leaving the Council of Europe and ECHR are likely to be unpalatable to any future Conservative government, at least for now. But it is not likely that the animosity towards the Court will diminish or remain limited to government ministers or members of the Conservative Party. Nicolas Bratza, formerly the UK judge at the ECtHR and the President of the Court between 2011-2012, has written of the 'vitriolic' and 'xenophobic' fury directed against the ECtHR by the UK press, parliamentarians and members of government over the prisoner voting judgments.[36] In a speech to relaunch Policy Exchange's Judicial Power Project, John Finnis observed:

> In maturely self-determined polities with a discursively deliberative legislature, it is not wise to allow courts to constitute themselves as roving law reform commissions like the ECHR, the ECJ, SCOTUS and SCC and increasingly the UKSC. That doctrine

[35] *Legislating for the United Kingdom's Withdrawal from the European Union* (London: TSO, 2017) Cm 9466 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf last accessed 10 May 2017.

[36] N. Bratza, 'The relationship between UK courts and Strasbourg' [2011] *European Human Rights Law Review* 505, 505-506. See also S. Marks, 'Backlash: the undeclared war against human rights' [2014] *European Human Rights Law Review* 319 and P. Mahoney, 'The relationship between the Strasbourg Court and the national courts' [2014] *Law Quarterly Review* 568.

> that these courts articulate to explain and justify doing so is that the Constitution or Convention or other instrument that they are responsible for applying is a living tree (the Canadian phrase) or living instrument (the ECHR phrase).[37]

Finnis took particular issue with the development of the interpretation of Article 3 to protect against removal from a State where there was a real risk of Article 3 ill treatment in the destination state.

3.2 What part has European consensus played?

In considering the part that the consensus methodology of the ECtHR has played in recent debates in the UK about the legitimacy of the Convention system, it is important to take into account that only six judgments of the more than 500 judgments of the ECtHR concerning the UK have been employed to illustrate the Conservative Party's case with the most recent decided in 2013.[38] It is no secret that the debate centres very much on a limited selection of case law from an earlier era. However, of the six judgments, European consensus was utilised, with varying degrees of influence, by the ECtHR in finding the UK in violation of at least one Convention right in all apart from *Al-Skeini v UK*.[39] A very simplistic analysis

[37] John Finnis, "Judicial Power: Past, Present and Future", 21 October 2015 available at http://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/

[38] *Soering v United Kingdom*, Application no. 14038/88, 7 July 1989; *Hirst v United Kingdom (No.2)* Grand Chamber, Application no. 74025/01, 6 October 2005; *Dickson v United Kingdom*, Grand Chamber, Application no. 44362/04, 4 December 2007; *Al-Skeini v United Kingdom* Grand Chamber, Application no. 55721/07, 7 July 2011; *Othman (Abu Qatada) v United Kingdom*, Application no. 8139/09, 17 January 2012; *Vinter v United Kingdom*, Grand Chamber, Application no. 66069/09, 9 July 2013.

[39] Ibid.

therefore suggests that the use of consensus in decision making has done very little to improve the legitimacy of the Court, its judgments, the chances of implementation or the acceptance of the Convention system in the UK. Indeed, an enhanced focus on the fact that the UK is out of step with other Contracting States on a particular issue, might actually feed antagonism towards the ECtHR. As Atkins notes, contemporary politicians have attempted to respond to current anxieties by "articulating their visions of Britain and Britishness, through which they seek to unite the citizenry around a set of shared ideals and a common identity."[40] Former Prime Minister David Cameron "defined Britishness against the European Other"[41] capitalising on "Britain's self-image as an exceptional nation, along with its island mentality".[42]

But whilst negativity towards the Court has remained in the face of consensus based reasoning, this has not been reflected in a widespread failure on the part of the UK to implement judgments of the Court apart from the prisoner voting judgment in *Hirst*. All five of the prisoner voting judgments are currently under the enhanced supervision of the Committee of Ministers and the UK has been given until September 2017 to submit concrete proposals to comply.[43] Prospects for UK compliance do not look strong given that the language used by the Ministry of Justice in its recent report on compliance with human rights judgments has hardened. It was noted that, whilst the Government was currently in

[40] J. Atkins, '(Re)imagining Magna Carta: Myth, Metaphor and the Rhetoric of Britishness' (2016) 69 *Parliamentary Affairs* 603, 604.

[41] Atkins, ibid, 604.

[42] Atkins, ibid, 611.

[43] Committee of Ministers *Supervision of the Execution of Judgments and Decisions Annual Report 2016* (Strasbourg: Council of Europe, 2017), p.178.

dialogue with the Committee of Ministers on the issue, it was "clear that the UK's policy on prisoner voting is well established and remains a matter for the UK Parliament to determine."[44]

What the reaction to *Hirst* indicates is that consensus based reasoning is no match for a highly politicised issue resulting in an adverse judgment for the UK. In such instances, the Court's use of consensus seems to add nothing at all. The fact that the UK is out of step on a particular issue is usually well known prior to the judgment of the Court. Increasingly, as the HRA beds in and the Joint Committee on Human Rights continues its work in Parliament, both the executive, legislature and judiciary are fully aware of the UK's position, by comparison to other European countries and often the US, Australia, Canada, South Africa and New Zealand as well, before a Bill is even introduced into Parliament. For the ECtHR to revisit this research, in an effort to enhance the legitimacy of its decision or to persuade the Contracting State seems a fairly futile exercise. In some instances, the government may even agree with the Court's conclusion on consensus. For example, the issue in *Vinter v UK*[45] was not actually the fact that a 25 year review was required in relation to whole life sentence prisoners. The government agreed with the Court that it was. Its objection was that this was already adequately reflected in national law, policy and practice, and therefore further legislation was not required.[46]

[44] Ministry of Justice *Responding to Human Rights Judgments* (London: TSO, 2016) Cm 9360, p.38. See further E. Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 *Human Rights Law Review* 503

[45] Application no. 66069/09, 9 July 2013.

[46] The ECtHR later accepted this submission in *Hutchinson v UK*, Application no. 57592/08, 3 February 2015.

The Committee of Ministers in its 2016 Annual Report noted that the most significant barriers to implementation are frequently of a political nature and this is clearly true for the UK:

> Overcoming them requires, in the final analysis, the capacity to generate a vision of what could be an acceptable solution from the Convention perspective. Such situations call for creativity, both on the part of national bodies and on the part of the Council of Europe ones, whether the "expert" bodies, such as the Venice Commission, or the "political" ones, namely the Committee of Ministers itself or the Parliamentary Assembly. They also call for critical thinking. A number of problems are linked with misunderstandings regarding what is really required by the Convention and, sometimes, regarding the national realities.[47]

It might be argued that generally where politics does get in the way, pointing out that the UK is an outlier on a particular issue and utilising this to find a breach of the ECHR on the part of the UK can be an obstacle to implementation and also fuel antagonism towards the system generally. But there are examples of judgments where consensus based reasoning has been employed to find against the UK on a highly politicised issue, but the judgment has been implemented despite this. One example is the application of Abu Qatada whose extradition to Jordan to stand trial for terrorist offences had been found compatible with Articles 3 and 6 of the ECHR by the UK House of Lords (now the Supreme Court).[48] The ECtHR reached a different conclusion finding that there was a real risk of a flagrant denial of justice from the admission of evidence obtained by torture at his trial and that the proposed

[47] *Annual Report 2016*, p.14.

[48] *RB (Algeria) v. Secretary of State for the Home Department* [2009] UKHL 10.

extradition was therefore incompatible with Article 6.[49] In relation to consensus, and morality, the Court stated as follows:

> […] in the Convention system, the prohibition against the use of evidence obtained by torture is fundamental. . Strong support for that view is found in international law. Few international norms relating to the right to a trial are more fundamental than the exclusion of evidence obtained by torture. There are few international treaties which command as widespread support as UNCAT. One hundred and forty-nine States are party to its provisions, including all Member States of the Council of Europe . . For the foregoing reasons, the Court considers that the admission of torture evidence is manifestly contrary, not just to the provisions of Article 6, but to the most basic international standards of a fair trial. It would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome.[50]

Despite the politicisation of this judgment and the media furore stirred up,[51] the UK government did not extradite until more than 18 months after the judgment once an agreement had been reached with Jordan that his trial would not involve the use of evidence obtained by torture.[52]

[49] ECtHR, *Othman v. UK*, Appl. no. 8139/09, Judgment of 17 January 2012.

[50] [265]-[267].

[51] See further, J. Middleton, 'Taking rights seriously in expulsion cases: a case study' [2013] *European Human Rights Law Review* 520.

[52] He was acquitted of the offences in June 2014.

Another example is the judgment of the ECtHR in *S and Marper v UK*.[53] Here the Court paid particular attention to the fact that the UK was very much out of step with other States and international standards on the issue of police collection and retention of personal data from non-convicted persons. This finding did not automatically mean that the UK was in violation of the Convention, but it narrowed the margin of appreciation and when the interests at stake were balanced, a violation was found. This was also a highly politicised issue, but the judgment was met with very little backlash at the national level. Whilst the persuasiveness of the judgment of the Court here was assisted by consensus, more important was the fact that there had been very little rigorous consideration of the issue at the national level by the courts, executive or judiciary and campaigners for reform had employed a successful strategy by portraying the applicants as ones the average person might have something in common with. It could be one's son, friend, neighbour, who through a combination of misfortune just happened to end up on the National DNA Database forever despite having never been convicted of a crime. Implementation of the judgment was fairly swift[54] and it continues to have important ramifications for the retention of data by the State.

These two judgments, *Othman* and *Marper*, illustrate that it is possible to implement judgments where consensus based reasoning has been employed to find a violation even if these are highly politicised. But consensus has played a very small part, if any part at all, in enhancing legitimacy and the chances of implementation. In its judgment in *Othman* the Court also delivered a robust moral message which was difficult for the UK government to ignore given the strong stance it had taken against torture on the international stage. In

[53] Application no. 30562/04, 4 December 2008.

[54] Protection of Freedoms Act 2012.

Marper, whilst consensus played a part in the reasoning, NGOs had campaigned effectively for this result which was also supported by the opposition political parties including the Conservative Party and Liberal Democrats. By contrast, in its judgment in *Hirst*, the Court did not provide a strong enough moral explanation for its decision and opinion at the national level remains deeply divided. Consensus alone has some influence but cannot overcome resistance to change where the political stakes are high.

3.3 Consensus supports a conclusion that the UK is not in violation

Whilst the experience in the UK indicates that consensus based reasoning fails to achieve its aims when faced with a highly politicised issue, also to be taken into account in any assessment of the methodology must be those judgments where consensus based reasoning has led the Court to conclude that the UK has not breached the ECHR. Whilst, understandably, this aspect of these judgments has not been something openly celebrated by successive respondent governments, it has frequently assisted the Court in reaching the conclusion that the UK was not in breach of the ECHR in relation to applications which would have been almost as controversial as *Hirst*. One example, already discussed, is the *Animal Defenders International* judgment. A further example is *Jones v UK*.[55] Here the claimants had issued proceedings in the UK against the Kingdom of Saudi Arabia and servants and agents of the Kingdom for various torts and torture which had occurred in the Kingdom.

The House of Lords had held that the State Immunity Act 1978 conferred immunity on all of the respondents and that this was not incompatible with the right of access to court

[55] Appl. nos. 34356/06 and 40528/06, Judgment of 14 January 2014.

conferred by Article 6 of the ECHR.[56] It was for the ECtHR to determine whether or not the grant of immunity here was in breach of Article 6, and particularly whether the immunity was proportionate to the legitimate aim pursued. This was an important case for all Contracting States given the ECtHR was considering whether or not an exception should be created to state immunity where civil claims for torture were made against foreign State officials. The judgment of the House of Lords prevailed and the ECtHR concluded that there was no violation of Article 6 by affording state immunity to both States and servants and agents of the State. Here consensus based reasoning carried out by the House of Lords was subsequently adopted by the ECtHR.[57]

A further example is the judgment in *Shindler v UK*[58] where the Court used consensus to determine the width of the margin of appreciation. The application concerned the law prohibiting British citizens residing overseas for more than 15 years from voting in UK parliamentary elections. It was argued that this was incompatible with Article 3 of Protocol No.1 to the ECHR. The Court held that a relevant factor in determining the scope of the margin of appreciation here was "the existence or non-existence of common ground between, or even trends in, the laws of the Contracting States".[59] It concluded that there was a wide margin of appreciation and no violation here. On consensus, it stated as follows:

> While the majority in favour of an unrestricted right of access of non-residents to voting rights appears to be significant, the legislative trends are not sufficient to

[56] *Jones v Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270.

[57] [30] and [209]. See further G. Bindman, 'A missed opportunity' (2014) 164 *New Law Journal* 9.

[58] Application no. 19840/09, Judgment of 7 May 2013.

[59] [102]

> establish the existence of any common European approach concerning voting rights of non-residents. . . It therefore cannot be said that the laws and practices of member States have reached the stage where a common approach or consensus in favour of recognising an unlimited right to vote for non-residents can be identified.[60]

Whilst the Court's utilising consensus based reasoning in this way is not openly celebrated by the respondent government, it still has an impact. It has helped the Court to reach a conclusion favourable to the UK government. In Henrard's opinion:

> […] the Court's use of the European consensus factor enables it to avoid taking a stance on (often controversial) matters that are closely intertwined with deeply held national constitutional values and the related national constitutional identity. The reluctance to take a stance that would undermine such national values arguably reflects a fear of antagonising the contracting state(s). This fear is related to the Court's concern that antagonising states in this respect could trigger structural refusals to implement the Court's judgments, which would undermine the entire system.[61]

In short, if the Court had found against the UK in the applications discussed above, in particular in its *Animal Defenders International* judgment, it is likely that the UK would no longer be a Contracting State to the ECHR, or at least it would be on its way out. In these instances consensus based reasoning has undoubtedly contributed to the UK government's decision to remain, at least for now, a Contracting State. However, the approach of the

[60] [115].

[61] Henrard, 'How the European Court of Human Rights', 414.

Court has been criticised. For example, the Joint Committee on Human Rights has stated that judgments such as that in *Animal Defenders International* are illustrations of the Court bending to the "political will" of the UK rather than its national system for safeguarding human rights.[62] In other words, it is thought that rather than rigorously examining the application before it, consensus has been employed by the Court to reach a conclusion that is acceptable to the UK government. The drawbacks of such an approach are considered in the following paragraphs.

4 Endangering legitimacy for non-governmental stakeholders

For the continued effectiveness and survival of the ECHR system of protection, it is important for the judgments of the ECtHR, and the system as a whole, to also be perceived as legitimate by applicants, NGOs and other stakeholders. This should not be underestimated as Alter has observed:

> […] where ICs [international courts] lack domestic support constituencies, governments can defend non-compliance with international rules as consistent with the domestic rule of law. But where there are government and nongovernmental actors who do prefer to follow international law, ICs can help construct coalitions of counterpressures that alter the political balance in favour of policies that better cohere with international legal obligations. . . ICs become politically weak not because governments oppose them . . . Rather, ICs become politically weak when legal and policy defenders will not organize to demand that governments adhere to

[62] Joint Committee on Human Rights *Protocol 15 to the European Convention on Human Rights* (2014-15) HL Paper 71, HC 837, p.31.

the particular legal covenants or to the particular interpretations of the law the IC is promoting."[63]

The disappointment with recent judgments of the Court utilising consensus to find the UK not in violation of the EHCR is growing and questions of legitimacy are being raised by various non-governmental actors. According to Fenwick "reliance on finding a European consensus in socially sensitive contexts can merely lead to acceptance of detrimental treatment of groups traditionally vulnerable to discrimination."[64] Draghici has observed that "methodologically flawed findings of European consensus expose the Court to criticism and mistrust"[65] and in Henrard's opinion, the Court may well be losing the very legitimacy it is trying to maintain when it sacrifices effective protection of fundamental rights to "keep states on board".[66]

Non-governmental stakeholders would agree that looking for the consensus on a particular issue can be a useful way to guide the Court where there might be a range of reasonable responses. For example, in *Vinter v UK*,[67] rather than picking a number of years at which a review of sentence was necessary to comply with Article 3, the Court concluded that the comparative and international law materials before it showed clear support for the institution of a dedicated mechanism guaranteeing a review no later than 25 years.[68]

[63] K. Alter *The New Terrain of International Law* (Princeton: Princeton University Press, 2014), 24.

[64] Fenwick, 'Same Sex Unions', 249.

[65] Draghici, 'The Strasbourg Court', 28.

[66] Henrard, 'How the European Court of Human Rights", 414.

[67] Application no. 66069/09, 9 July 2013.

[68] [120].

Similarly in *Othman v UK*[69] the Court made good use of relevant comparative and international law on torture and the use of evidence obtained by torture to reach its conclusion on Article 6 and flagrant denial in the extradition context. It was difficult for anyone to argue that this conclusion came out of nowhere. Similarly its conclusion in *Al-Saadoon and Mufdhi v UK*[70] based on the ratification of Protocol No.13 and consistent state practice that "Article 2 has been amended so as to prohibit the death penalty in all circumstances"[71] gave considerable weight to its conclusion that the UK had breached Article 2 and Article 1 of Protocol No.13 by handing over the applicants to Iraqi authorities.

However, inconsistent and arbitrary use of consensus based reasoning, particularly where it results in a judgment in favour of a State, can have a negative impact on the Court's legitimacy from the perspective of applicants and other stakeholders. As discussed in the following paragraphs, judgments like *Animal Defenders International*, where the weight of consensus clearly indicated a different conclusion from that reached by the Court, can be perceived as arbitrary and, in the opinion of some, an example of a Court deciding in accordance with its assumption of what the system can bear, rather than deciding in accordance with the weight of persuasive authority, and other important principles.[72] Two areas are of particular concern: inconsistency in the use of consensus to determine the

[69] Application no. 8139/09, 17 January 2012.

[70] Application no. 61498/08, 2 March 2010.

[71] [120].

[72] T, Lewis and P. Cumper, 'Balancing freedom of political expression against equality of opportunity: the courts and the UK's broadcasting ban on political advertising' [2009] *Public Law* 89.

width and application of the margin of appreciation; and the use of consensus to hinder new developments in the scope of the Convention rights.

4.1 Stakeholder legitimacy and the margin of appreciation

In *Shindler v UK*[73] the Court explained that it was appropriate to examine "the nature and extent of the developments at the international level and within the laws of the member States in order to determine whether there is any emerging trend or possibly even consensus which might affect the scope of the margin of appreciation."[74] However, where consensus is used in this manner, a number of inconsistencies have arisen in judgments concerning the UK. First, in the choice of state practice and second, on whether the measure itself or the impact of the measure on the applicants is assessed for compatibility.

Commonly the Court has held that where there is no agreement among States, and the UK fits somewhere along the spectrum of possible responses, the margin of appreciation is wide. Where there is agreement among a substantial number of states, and the UK is an outlier in that it is doing something different to several other States, the margin is narrow.[75] For example, in *S and Marper v UK*[76] the state practice was understood to be the blanket taking and retention of DNA samples and profiles. As the UK was an outlier, the margin of appreciation was narrow:

[73] Application no. 19840/09, Judgment of 7 May 2013.

[74] [114].

[75] See further D. J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckley *Law of the European Convention on Human Rights Third Edition* (Oxford: Oxford University Press, 2014) pp.14-17.

[76] Application no.30562/04 and 30566/04, 4 December 2008.

> […] most of the contracting States allow these materials to be taken in criminal proceedings only from individuals suspected of having committed offences of a certain minimum gravity . . great majority of the Contracting States with functioning DNA databases, samples and DNA profiles derived from these samples are required to be removed or destroyed[77]

However, the Court's reasoning is not always so consistent or rigorous. In its judgment in *Animal Defenders International v UK*[78] what the Court should have looked for was consensus on blanket bans on broadcast political advertising. Given the small number of states which have such blanket bans, the margin of appreciation afforded to the UK should have been narrow. However, the Court chose to look at consensus on the regulation of paid political advertising and found a lack of consensus which broadened the margin of appreciation.[79] No violation was found by nine votes to eight. The dissenting judges picked upon this anomaly in the majority's reasoning:

> […] this comparative law material . . . cannot serve as an appropriate basis to accord the respondent State a wide margin . . . We are perplexed with an approach which attempts to justify for the purposes of the Convention a severe restriction on freedom of expression by reference to a variety of regulatory frameworks which do not specifically address the issue under examination.[80]

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[77] [108].

[78] Application no.48876/08, 22 April 2013.

[79] [123].

[80] See five dissenting joint judgments [15]; see also three dissenting joint judgments at [15] and [17]. The majority judgment has also been the subject of academic criticism. See further, T. Lewis, "Animal Defenders

There are also examples where consensus is discussed and clearly could have been utilised to find the UK in violation of the ECHR but, with little explanation, it plays no role in the eventual decision. For example, in *RMT v UK*[81] the ECtHR determined that the UK's ban on secondary strike action was not incompatible with Article 11 of the ECHR. In relation to consensus, the Court stated as follows:

> It is nevertheless clear that, with its outright ban on secondary action, the respondent State stands at one end of the comparative spectrum, being one of a small group of European States to adopt such a categorical stance on the matter. The varied comparative picture, and the position of the United Kingdom within it, do not in themselves, however, mean that the domestic authorities have overstepped their legitimate margin of appreciation in regulating this aspect of trade-union activity.[82]

The UK being an outlier on this question should have indicated to the Court that the margin of appreciation was narrow and that the UK was in violation. But this was not the conclusion reached.

Even if the correct State practice is identified by the Court, there is inconsistency as to whether the Court determines whether the State practice generally is incompatible, or whether the incompatibility lies in the particular circumstances of the applicants. This

International v United Kingdom: Sensible Dialogue or a Bad Case of Strasbourg Jitters?" (2014) 77 *Modern Law Review* 460.

[81] Application no. 31045/10, 8 April 2014.

[82] At [91].

appears to shift depending upon what result the Court would like to achieve.[83] For example, in its *RMT* judgment, it seemed likely that a violation would be found in relation to the legislative blanket ban on secondary strike action given the Court's comments on consensus. However, it decided to focus on the facts of the applications rather than the law generally, and found no violation, stating as follows:

> […] a State may, consistently with the Convention, adopt general legislative measures applying to predefined situations without providing for individualised assessments with regard to the individual, necessarily differing and perhaps complex circumstances of each single case governed by the legislation […] That does not mean the specific facts of the individual case are without significance for the Court's analysis of proportionality. Indeed, they evidence the impact in practice of the general measure and are thus material to its proportionality […] As already stated, the interference with the applicant union's freedom of association in the set of facts . . relied on by it cannot objectively be regarded as especially far reaching.[84]

The Court's finding of no violation in this judgment was not only inconsistent with its own past practice on the use of consensus but contrary to the conclusions reached by the European Committee on Social Rights and the International Labour Organisation's

[83] This is not a problem unique to the interpretation and application of qualified rights. Often in the context of Article 6, for example, the Court changes what it measures compliance against. For example, in *Hanif and Khan v UK* Application nos. 52999/08 and 61779/08, 20 December 2011 it didn't find the practice of allowing police officers generally to serve on juries to be incompatible with Article 6, but did find the application in the circumstances of the applicants to be in breach.

[84] At [101].

Committee of Experts.[85] The ECtHR explained that these "specialised international monitoring bodies" have a "different standpoint, shown in the more general terms used to analyse the ban on secondary action".[86]

By contrast in *Shindler v UK*[87] the Court focussed on the law generally rather than the circumstances of the applicants and, finding no consensus on the issue of disqualification from voting for those not resident in the UK for more than 15 years, concluded that the margin of appreciation was wide and there was no violation. Similarly in its judgment in *Animal Defenders International* the Court chose to focus on the law generally rather than its impact on the applicants. A wide margin of appreciation, based upon consensus analysis, was found and it was concluded that the law fell within the acceptable limits of this. It is unlikely that the Court would have reached the same conclusion, had it taken into consideration the circumstances of the applicant who was seeking to broadcast a television advertisement directed against the keeping and exhibition of primates. This approach was also contrary to the Court's judgment in the closely comparable application *TV Vest v Norway*[88] where it focussed on the facts of the application rather than the ban on political advertising on television to find a clear breach of Article 10 of the ECHR.

[85] Report of the Committee of Experts to the International Labour Conference, 102nd Session, 2013, ILC. 10/III (1A), pp.195-96.

[86] *National Union of Rail, Maritime and Transport Workers v UK*, Appl. no. 31045/10, Judgment of 8 April 2014 at [98]. The divergence between ECtHR jurisprudence and that of other international human rights bodies is increasing. See, for example, D. McGoldrick, "In defence of the margin of appreciation and an argument for its application by the Human Rights Committee" (2016) 65 *International and Comparative Law Quarterly* 21.

[87] Application no. 19840/09, Judgment of 7 May 2013.

[88] *TV Vest AS & Rogaland Pensjonisparti v Norway*, Application no. 21132/05, 11 December 2008.

4.2 Stakeholder legitimacy and the development of Convention rights

Finally, consensus based reasoning has also been utilised in judgments such as *Da Silva v UK*[89] where there is a new issue of interpretation or application of the Convention put forward by the applicant and it is for the Court to determine the scope of the relevant Convention right. In common with techniques in national courts, the ECtHR looks to judgments in other jurisdictions for inspiration. However, the UK experience of this is a conservative one. Rather than using the principle of European consensus to inspire and provoke a new direction in Convention jurisprudence, it has generally been employed to dismiss applicants' creative arguments. The implied message, then, is that, if there have not been similar developments in a number of other States or recognition in international law, the ECtHR is not willing to be the catalyst for change.

For example, in *Mosley v UK*[90] the applicant raised a novel issue of interpretation by arguing that Article 8, the right to respect for private life, should impose upon States a duty to require the media to comply with a pre-notification requirement to those whose privacy was about to be the subject of a serious intrusion. Given the symbiotic relationship between media and government in many European countries, particularly the UK, it is difficult to imagine such a novel interpretation of Article 8 ever being contemplated at the national level, by executive, judiciary or legislature. Looking for consensus, the Court found a diversity of State practice and therefore a wide margin of appreciation. It determined that in the UK, the absence of a pre-notification requirement was not incompatible with Article 8.[91]

[89] *Da Silva v UK*, Application no. 5878/08, 30 March 2016.

[90] Application no. 48009/08, 10 May 2011.

[91] [110] and [124].

In short, if there is not a sufficient number of Contracting States to have pursued such a novel interpretation and application of the Convention, the Court is not going to lead the way. That is not to argue that there should be a violation of Article 8 found in such instances, but that the possibility of Article 8 evolving in such a direction should be given serious consideration, and not trumped by considerations of consensus.[92]

Current practice is very much in contrast to the position occupied by the Court in the UK legal system in previous years when its judgments were often a catalyst for change at the national level. Landmark judgments similar to *Smith*[93] (blanket ban on homosexual service personnel), *Osman*[94] (positive duty on police to protect), and *Campbell and Cosans*[95] (corporal punishment in schools) are now very much the exception rather than the norm. It is difficult to imagine an application like *Goodwin v UK*[96] coming before the Court. Here the applicant alleged a number of violations of the ECHR in respect of the legal status of transsexuals in the UK and their treatment in the spheres of employment, social security, pensions and marriage. It was not possible to bring this complaint under national human rights law as the HRA only came into force on 2 October 2000. Taking into account the "continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative

[92] See further, H. Fenwick, 'Same Sex Unions'.

[93] ECtHR, *Smith and Grady v. United Kingdom*, Appl. Nos. 33985/96 and 33986/96, Judgment of 27 September 1999.

[94] ECtHR, *Osman v. United Kingdom*, Appl. No. 23452/94, Judgment of 28 October 1998.

[95] ECtHR, *Campbell and Cosans v United Kingdom*, Appl. Nos. 7511/76 and 7743/76, Judgment of 25 February 1982.

[96] Application no. 28957/95, 11 July 2002

transsexuals", the Court found violations of Articles 8, 12, 13 and 14 of the ECHR. Were a similar fact situation to arise today, it would most likely be resolved, in favour of the applicant, at the national level and if it were not, the ECtHR may not even consider it. High profile applications raising difficult political issues, such as the UK's ban on assisted suicide, have been found by the Court to be inadmissible.[97]

With the Court using consensus reasoning to avoid imposing radical change on States such as the UK, and engaging in inconsistent and often flawed consensus reasoning, criticism from non-government UK stakeholders is likely to become almost as strong as that from the government. It might be time to accept that the Court's role in prompting new directions in the protection of human rights is now much reduced, particularly in light of the fact that national human rights protection under the HRA, at least for the moment, encourages detailed consideration of these issues by the legislature, executive or judiciary prior to an application to the ECtHR. In short, as McGoldrick notes, on some issues such as the prohibition of sexual orientation discrimination, progress at the national level may achieve more than the Council of Europe:

> […] strategic litigation and advocacy relying on domestic constitutional and legislative equality or non-discrimination provisions, sometimes with the use of international or transnational jurisprudence to assist progressive interpretations . .

[97] *Nicklinson and Lamb v UK*, Applications Nos. 2478/15 and 1787/15, Fourth Section Decision, 16 July 2015. The Court noted that the Supreme Court was entitled to conclude that the views of Parliament weighed "heavily in the balance" given the absence of consensus among Contracting States, [85].

may carry a greater domestic legitimacy and authority than international jurisprudence."[98]

5 Conclusion

Consensus based decision making in ECtHR judgments concerning the UK has increased in recent years with it most often used to assist the Court in reaching the conclusion that the UK has not breached the Convention. It has affected the Court's determination of the scope of various Convention rights, and its application of the margin of appreciation. There has been a marked change from its use in older judgments such as *Marper* and *Hirst* to its use in more recent judgments such as *Animal Defenders International* and *Jones*. But it has had very little impact at all in combatting current animosity towards the Court generated by those judgments where the UK has been found in breach and the issue is highly politicised. There is an added danger that for the Court to point out that the UK is an outlier with its blanket ban on something like prisoner voting may actually fan the flames of national sovereignty and British exceptionalism. A strong moral message and considerable national support for the position reached by the Court must operate alongside consensus to help push through a resolution.

It is important not to overlook the fact that by employing consensus based reasoning to find that the UK is not in violation of the Convention, the Court has encouraged the UK to remain a member of the Convention system. But what is not clear is for how long the Court can continue to use consensus based reasoning in this way without adverse consequences.

[98] D. McGoldrick, "The Development and Status of Sexual Orientation Discrimination under International Human Rights Law" (2016) 16 *Human Rights Law Review* 613, 664.

Where consensus based reasoning leads the Court to a conclusion which commands strong support at the national level, not only from government, adverse consequences are few. But as illustrated in this chapter, there are exceptions and judgments such as that delivered in *Animal Defenders International* are leading many non-governmental stakeholders to question the legitimacy and continuing usefulness of the Court. As the Court moves into its "age of subsidiarity",[99] it should be careful to note that without the strong support of its non-governmental stakeholders, it will be increasingly weakened. For a State such as the UK, with, at present, strong national human rights protection, procedurally and substantively the same as that offered by the ECHR and ECtHR, an independent and impartial judiciary which also engages in its own consensus based reasoning, and a relatively robust civil society, it may be that more can be achieved at the national level in effect saving the ECtHR from getting involved in difficult and sensitive issues and preserving the Convention system for those States experiencing more pressing and gross violations of Convention rights. Those looking for a novel or "dangerous" new direction in human rights jurisprudence should perhaps no longer look to the ECtHR, particularly if the issue is politically sensitive and European consensus signals possible defeat.

[99] R. Spano, "Universality or Diversity of Human Rights: Strasbourg in the Age of Subsidiarity" (2014) 14 *Human Rights Law Review* 487.